No. 91-410

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

ARDOLFO MUNOZ,
STAFF SERGEANT, UNITED STATES ARMY,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Military Rule of Evidence 404(b), and the identical Federal Rule of Evidence 404(b), as applied in a child sexual abuse case, permit the admission of testimony from an older daughter relating uncharged acts of sodomy allegedly occurring 12 to 18 years earlier to prove that petitioner "planned" to commit the charged acts of fondling a younger daughter, born after the uncharged acts occurred.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: Page

TABLE OF AUTHORITIES—Continued

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PETITION FOR A WRIT OF CERTIORARI

The petitioner, Ardolfo Munzo, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Military Appeals is reported at 32 M.J. 359 (C.M.A. 1991) (Appendix A). The opinion of the Army Court of Military Review is an unpublished, short form decision (ACMR 8901236 (A.C.M.R. 3 January 1990)) (Appendix B).

JURISDICTION

The decision of the Court of Military Appeals was rendered on June 14, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1991).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty or property, without due process of law . . .

Rule 404 of the Military Rules of Evidence, Manual for Courts-Martial, United States, 1984 (hereinafter MCM, 1984), Pt. III, Exec. Order No. 12473, 49 Fed. Reg. 17152 (1984), provides:

> **Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes**
>
> (a) *Character evidence generally.* Evidence of a person's character or trait of a person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:
>
> * * * *
>
> (b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

On March 21 and 22, 1989, petitioner was tried at Fort Monmouth, New Jersey, before a general court-martial composed of officer members [hereinafter the "jury"].[1] Contrary to his pleas, petitioner was found guilty of indecent acts with a child, in violation of Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ]. The jury sentenced petitioner to a bad-conduct discharge, confinement for three

[1] Court-martial members are analogous to jurors.

years, and forfeiture of $300.00 pay per month for 36 months.

Petitioner was charged with committing indecent acts on five occasions by fondling the breasts and vagina of the victim—his minor daughter, Annette Munoz. All but one of the fondling incidents allegedly occurred during the evening while petitioner and the victim were alone in the home [2] and after petitioner had been drinking.

During a pretrial session, the defense counsel moved to preclude the admission of any evidence concerning alleged acts of prior sexual misconduct between petitioner and his other daughters (R. 18). Opposing the motion, the Government stated its intent to offer testimony of uncharged misconduct from two of petitioner's older daughters, asserting that such evidence was admissible in its case-in-chief under Manual for Courts-Martial, United States, 1984, Military Rule of Evidence [hereinafter Mil. R. Evid.] 404(b) to "prove a common scheme or plan." [3] (id.). The prosecutor proffered that petitioner's daughter Alberta Munoz would testify that on one occasion petitioner fondled her breast (R. 19), and that his daughter Isabel Munoz would testify that petitioner also fondled her 12 to 18 years earlier (R. 19-20). The prosecutor specifically indicated that daughter Isabel's testimony would be limited to incidents of fondling because the Government recognized the extremely prejudicial nature of additional evidence alleging acts of sodomy involving daughter Isabel and petitioner (R. 25).

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[2] The jury acquitted petitioner of one incident of fondling, which the victim claimed was witnessed by her imaginary friend, Christy. Record of Trial [hereinafter R.] 106-108, 125, 138, 245, 265.

[3] Mil. R. Evid. 404(b) is identical to and based upon Federal Rule of Evidence 404(b). Manual for Courts-Martial, Appendix 22, pp. 22-32, United States (1984). Also see, Saltzburg, Schinasi and Schlueter, Military Rules of Evidence Manual, Drafters' Analysis, p. 364 (2d ed. 1986) (a conflict in interpretation of the identical rule presents a federal question for this Court to resolve).

Before entry of pleas, and based on the Government proffer, the judge denied the defense motion. He ruled as follows:

> All right, with respect to your motion on the testimony of the two witnesses, Alberta and Isabel, I find that the testimony of these two witnesses to be probative of a plan on the accused's part to sexually abuse his children and I find a nexus of time. The fact that the events were removed in time from the other does not undermine their relevance. Whether you have the same victim is an important component of the alleged plan. The similarity of the acts; that is, the fondling of breasts and vagina; the common situs of the commission in the home of the family; the age of the victims at the time; the fact that the accused had been drinking are all matters of commonality that I've carefully considered.

(R. 47). Following the victim's testimony during the Government case-in-chief regarding the charged offenses, however, the defense counsel renewed his objection to the other daughters' testimony (R. 143). At that point, in a session without the jurors present [4], the judge heard the testimony of the other daughters. He ruled that daughter Alberta's testimony was "susceptible to more prejudice than substance", and determined it inadmissible under Mil. R. Evid. 403 (R. 149).[5] Nevertheless, he continued to rule that daughter Isabel's testimony was admissible (*id.*). Daughter Isabel then testified before the jurors that 12 to 18 years earlier [6] petitioner had fondled

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[4] Article 39, UCMJ, authorizes sessions of a court-martial outside the presence of the jury.

[5] The rule, like Federal Rule of Evidence (Fed. R. Evid.) 403 from which it derives, provides that otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[6] Daughter Isabel testified that the fondling started as tickling incidents when she was six years old.

her vagina and had committed oral and anal sodomy on her (R. 151-55). The military judge summarily denied defense counsel's motion to strike daughter Isabel's testimony (R. 158).

The Court of Military Appeals, noting common factors between the charged and uncharged acts such as the age of the victim, the situs of the offenses, the circumstances surrounding their commission, and the fondling nature of the misconduct, held that the judge correctly admitted the testimony of daughter Isabel as probative of a plan on petitioner's part to sexually abuse his children. *United States v. Munoz*, 32 M.J. 359, 364 (C.M.A. 1991). The Court concluded that the remoteness in time between the charged and uncharged misconduct was not a determinative factor because the object of the plan was the sexual abuse of petitioner's young daughters, and, accordingly, the victim's age at the time of the offense was the critical concern, not the period of time between the misconduct and the charged offense. *Id.* The court further opined that daughter Isabel's testimony was not more prejudicial than probative since her testimony corroborated that given by the victim. Lastly, the court concluded that the evidence of petitioner having sodomized daughter Isabel was simply "overkill," the prejudicial effect of which was limited when the judge provided the jurors with a limiting instruction on the use of that testimony. *Munoz*, 32 M.J. at 365.

REASONS FOR GRANTING THE WRIT

In its decision in petitioner's case, the Court of Military Appeals has laid the foundation for the creation of a class of criminal offenses to which the usual rules of evidence no longer apply. By permitting the indiscriminate use of evidence of other crimes in child sexual abuse prosecutions, the court embarked on a course towards direct confrontation with the two basic tenets of a fair system of justice—the presumption of innocence and the

government's burden of proof beyond a reasonable doubt. The court proposes an unfettered rule that threatens to trample on an accused's right to a fair trial.

With its decision, the court serves notice that, henceforth, the presumption of innocence no longer applies to defendants charged with acts of child sexual abuse if there are any allegations of prior uncharged acts which could be characterized under the general heading of "sexual misconduct". By ruling for the admission of an older daughter's uncharged allegations of oral and anal sodomy, a sharply divided Court of Military Appeals has expanded the evidentiary concept of "plan" under Mil. R. Evid. 404(b) to one that effectively embraces and makes admissible *all* prior sexual misconduct alleged to have been committed by a defendant in a child abuse sexual case, regardless of the lack of similarity between the acts or temporal proximity.

The question presented by this case is whether Mil. R. Evid. 404(b), and the identical federal rule[7] permit the use of dissimilar, more repugnant acts of sexual misconduct with real potential to inflame the jury, as proof of a plan in child sexual abuse prosecutions. This case concerns an offense not peculiar to the military and involves issues which frequently arise in civilian cases. The Court of Military Appeals' decision in this case exacerbates the conflict already existing among federal and state courts of appeal regarding this issue. It is an issue that has great practical significance and will affect the manner in which these cases are prosecuted.

The Court of Military Appeals' resolution of the issue is incorrect. The decision of the court raises serious implications as to the presumption of innocence and the defendant's right to due process, and warrants review by this Court.

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[7] Fed. R. Evid. 404(b).

I. THE ADMISSION OF ALL ALLEGATIONS OF PRIOR UNCHARGED MISCONDUCT WITH AN OLDER DAUGHTER VIOLATED PETITIONER'S FUNDAMENTAL RIGHT TO A FAIR TRIAL.

The presumption of innocence, although not expressly articulated in the Constitution, was long ago recognized by this Court as a basic component of a fair trial under our system of justice. *Coffin v. United States*, 156 U.S. 432, 453-60 (1895). To implement and protect this presumption, courts must carefully guard against dilution of the principle that guilt or innocence is to be determined solely on the basis of probative evidence introduced at trial, and not on highly prejudicial and unfounded allegations of repugnant acts of sexual misconduct with no probative value designed solely to inflame the passions of the jurors.

As derived verbatim from Fed. R. Evid, 404(b), Mil. R. Evid. 404(b) generally prohibits the introduction of evidence of extrinsic acts that might adversely reflect upon a defendant's character unless that evidence bears upon a relevant issue in the case. *See Huddleston v. United States*, 485 U.S. 681 (1988) (interpreting the comparable Federal Rule of Evidence); *United States v. Ferguson*, 28 M.J. 104 (C.M.A. 1989); *United States v. Brannon*, 18 M.J. 181 (C.M.A. 1984). The rule codifies the established principle that evidence of other crimes is not, in general, admissible to prove the defendant committed the offenses charged. Such evidence may be admissible, however, to support a proper inference of motive, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[8] The underlying rationale for the principle that evidence of bad character is not itself evidence of guilt is simply a corollary to the presumption of innocence.[9] A defendant must be tried for what he is

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[8] Mil. R. Evid. 404(b) and Fed. R. Evid. 404(b).

[9] *See Getz v. State*, 538 A.2d 726 (Del. 1988) (evidence of prior sexual contact with victim in child sexual abuse prosecution inad-

charged with, not what he allegedly did in the past. As Wigmore stated:

> The natural and inevitable tendency of the tribunal —whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge. Moreover, the use of alleged particular acts ranging over the entire period of the defendant's life makes it impossible for him to be prepared to refute the charge, since any or all of such acts may be mere fabrications.

1A Wigmore, Evidence, 58.2, at 1212-13 (Tillers rev. 1983).

This Court has acknowledged the tension between a defendant's substantive right to a fair trial under the due process clause and the doctrine admitting uncharged misconduct. *See Spencer v. Texas*, 385 U.S. 532 (1967). Implicit in that opinion is the idea that in a particular case, the evidence of uncharged misconduct might well create an intolerable risk that the jury would decide the case on an improper basis; swayed by evidence of offenses perhaps even more serious than those charged.[10] Petitioner submits that the Court of Military Appeals has erred in allowing a military judge to admit all uncharged allegations of sexual misconduct by a defendant in a child abuse case without regard to the potential prejudice to an individual and the threat to his constitutional right to due process. The risk warned of by this Court in *Spencer* has been fully realized here. Presented with the incred-

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missible under "plan" exception to uncharged misconduct rule, where it involved isolated incidents within the previous two years depicting no common plan other than multiple instances of sexual gratification.)

[10] E. Imwinkelried, *Uncharged Misconduct Evidence*, § 10:12 (1984).

ibly explosive testimony of daughter Isabel, in contrast to the suspect testimony of the victim, it seems all but certain that petitioner's conviction was based on the juror's conclusion that if he did it before he must have done it again.

Petitioner's daughter Isabel was permitted to testify that some 12 to 18 years earlier, petitioner had sexually molested her and committed oral and anal sodomy on her. This testimony was permitted despite the gross disparity between the nature of the acts of sodomy described by daughter Isabel and the charged fondling of the victim. In contrast to the victim's testimony, daughter Isabel testified that the locations of the acts varied; that other members of her family were nearby; that the assaults occurred at various times of the day and night; and that the molestations began when she was six years old.[11] The testimony was nonetheless determined to be similar enough to show that petitioner planned to commit the charged acts.

There was no physical evidence of abuse in petitioner's case. It was a classic credibility contest between the victim and her father. It was, however, a credibility contest where the jurors obviously questioned the victim's veracity because they acquitted petitioner of one of the charged offenses. Still, considering the tremendous emotional power of daughter Isabel's testimony, the average juror could only be swayed by it and conclude that petitioner probably committed the charged acts. But for the admission of the uncharged allegations, it is doubtful that petitioner would have been convicted.

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[11] The victim testified that the fondling incidents always occurred inside the home at night when she and the petitioner were alone and that they began when she was nine years old (R. 96).

II. UNCHARGED ALLEGATIONS OF SODOMY WITH ANOTHER DAUGHTER, OCCURRING IN A FAMILIAL SETTING, BUT DISSIMILAR TO, AND REMOTE IN TIME FROM, CHARGED ACTS OF FONDLING, ARE NOT EVIDENCE OF A "PLAN".

The trial judge allowed testimony by an older daughter of molestations and sodomies occurring 12 to 18 years earlier as proof of a "plan" to fondle a daughter not yet born when the incidents allegedly occurred. The Court of Military Appeals sustained the admissibility of this evidence. Both judicial decisions were plainly erroneous. The evidence is simply not relevant to prove that petitioner planned to commit the charged acts; just as evidence that a defendant had committed armed bank robbery would be irrelevant to prove that 15 years later he planned to shoplift from a convenience store.

The court, in rationalizing "significant elements of concurrence" out of dissimilar circumstances and dissimilar acts separated by up to 18 years, to ultimately find a "common plan" to sexually abuse children presents a clear misuse of the plan exception to the uncharged misconduct rule and trivializes the concept of "logical relevance". Repetition is not, in itself, evidence of a plan. Other crimes of the sort with which an accused is charged cannot be admitted under that guise. *United States v. Dothard*, 666 F.2d 498 (11th Cir. 1982). The only purpose of the evidence at issue here would be to suggest the accused's propensity to commit such acts, and that is the precise purpose for which the first sentence of Mil. R. Evid. 404(b) unambiguously prohibits this evidence from being used.

With a rise in child sexual abuse prosecutions, the lower courts have been forced to deal with the issue of admissibility of prior bad acts on an increasingly frequent basis. Unfortunately, a marked lack of uniformity currently exists among the courts in applying the rule of law at

issue.[12] In dealing with factual situations similar to the one presented in this case, the federal and state courts of appeal are in disagreement concerning the proper use of such evidence and have rendered diverse and conflicting opinions.

The decision of the Court of Military Appeals is in conflict with the decision of the Eighth Circuit Court of Appeals in *United States v. Fawbush*, 900 F.2d 150 (8th Cir. 1990). In dealing with the admissibility of testimony from two adult daughters of an accused in a child sexual abuse case that they had been sexually molested as children at least eight years earlier, that court stated:

> Fawbush's previous sexual abuse of his daughters was relevant to his motive, intent, plan, or knowledge with respect to the acts for which he was tried only insofar as the previous sexual abuse tended to show a propensity to commit such acts. Rule 404(b) flatly proscribes the admission of other act evidence for this purpose.

Fawbush, 900 F.2d at 151.

The decision of the court below represents the extreme concerning the admissibility of testimony of uncharged misconduct in these cases. No civilian federal court has permitted the admission of like testimony occurring so many years before the charged acts. Other federal courts, without specifically addressing the "plan" exception, have generally analyzed admissibility under one of the established exceptions to the uncharged misconduct rule.[13] Some

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[12] Thirty-eight states have adopted statutes governing the admissibility of uncharged misconduct. All these state statutes are virtually identical to Fed. R. Evid. 404(b). *See* E. Imwinkelried, *Uncharged Misconduct Evidence*, Appendix at 1 (1984).

[13] *E.g. United States v. Hadley*, 918 F.2d 848 (9th Cir. 1990) (in prosecution involving allegations of sodomy committed with a minor, prior bad act testimony of witnesses who testified that defendant had sodomized them ten years earlier admissible as highly probative of intent); *United States v. Gano*, 560 F.2d 990 (10th

state appellate courts, however, have taken as broad an approach to the "plan" exception as the court below in admitting uncharged allegations of sexual misconduct occurring many years before the charged acts.[14]

This broad approach to the "plan" exception has been aptly discussed by Professor Imwinkelried. He summarizes it as follows:

> If the proponent can show a series of similar acts, these courts admit the evidence on the theory that a pattern or systemic course of conduct is sufficient to establish a plan. Similarity or likeness between crimes is sufficient showing. In effect, these courts convert the doctrine into a plan-to-commit-a-series-of-similar-crimes theory. In reality, the courts are permitting the proponent to introduce propensity evidence in violation of the prohibition in the first sentence of Rule 404(b).

E. Imwinkelried, *Unchanged Misconduct Evidence*, § 3:23 (1984). That position finds support in the decisions of other state appellate courts that have declined to treat questions of admissibility of uncharged misconduct dif-

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Cir. 1977) (in prosecution of carnal knowledge case, testimony of uncharged misconduct that defendant had intercourse with victim's mother was properly admitted to establish the offenses charged by proving motive, preparation, plan and knowledge); *United States v. Beahm*, 664 F.2d 414 (4th Cir. 1981) (in prosecution for indecent liberties with children, testimony of uncharged misconduct from two male witnesses that defendant had made sexual advances to them three years prior to the offenses charged admissible because it tended to prove intent, which was a key issue in the case); *but see Story v. Collins*, 920 F.2d 1247 (5th Cir. 1991) (in aggravated sexual assault on a child prosecution, admission of extraneous offense testimony indicating that defendant exposed himself and masturbated in front of stepdaughter and one of her friends admissible because it indicated that defendant had the desire to engage in sexual conduct in stepdaughter's presence).

[14] *E.g. Heuring v. State*, 513 So.2d 122 (Fla. 1987); *Cooper v. State*, 325 S.E.2d 877 (Ga. 1985); *People v. Jones*, 335 N.W.2d 465 (Mich. 1983).

ferently in child sexual abuse prosecutions than in the prosecutions of other types of crimes.[15]

Adding to the confusion in this area, some of the lower courts have fashioned a special category for evidence of prior bad acts in child sexual abuse cases and bypassed the general prohibition on the use of such evidence by admitting it under a "lustful disposition" or "sexual propensity" exception.[16] These courts, however, have generally limited these special exceptions to uncharged acts of sexual abuse of children of the same sex as the victim occurring near in time to the acts charged.[17] Other state courts have expressly refused to adopt a special exception in child sexual abuse cases, finding the rationalizations for them untenable and determining that admissibility should be limited to the same standards provided for other crimes.[18]

The conflict and the confusion reigning in our nation's courts in this area of the law will not dissipate until the Court provides clear guidance. With review of this case, this Court can provide that needed guidance. The three

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[15] *E.g. Getz v. State*, 538 A.2d 726 (Del. 1988); *Commonwealth v. Shively*, 424 A.2d 1257 (Pa. 1981).

[16] *E.g. State v. Lachterman*, 810 S.W.2d—(Mo. App. 1991); *Johnson v. State*, 702 S.W.2d 2 (Ark. 1986); *Commonwealth v. Thomas*, 471 N.E.2d 376 (Mass. 1984); *State v. Hubbs*, 268 N.W.2d 188 (Iowa 1978).

[17] The courts advanced two rationales for this special exception. The first was the difficulty of proof. Sexual crimes are usually committed in private, there is rarely corroboration, and the prosecutions tend to degenerate into swearing contests. The second rationale was that evidence of deviant sexual misconduct has exceptional probative value. The courts assumed that such deviance was rare and in line with Victorian psychology, further assumed that deviant sexual offenders are extraordinarily recidivistic. E. Imwinkelried, *Uncharged Misconduct Evidence*, § 4:14 (1984).

[18] *E.g. Pendleton v. Commonwealth*, 685 S.W.2d 549 (Ky. 1985); *State v. Burchfield*, 664 S.W.2d 284 (Tenn. 1984); and see n.15 *supra*.

judges of the court below each wrote separate opinions and each adopted a distinct position on the admissibility of the challenged testimony. In the majority opinion, Chief Judge Sullivan has strained and distorted the "plan" exception to rationalize admissibility while dismissing any real considerations of prejudice. *Munoz*, 32 M.J. at 363-65. In his concurrence, Judge Cox advocates the adoption of a special exception for this type of uncharged misconduct in child sexual abuse cases. *Id.* at 365 and n. 1. In his vigorous dissent, Senior Judge Everett notes that the real purpose of the evidence is to show propensity; to suggest to the jurors that if the petitioner did it before he must have done it this time as well. This is the precise purpose for which the evidence may *not* be used. *Id.* at 367. Senior Judge Everett questioned the relevance of allegations of sodomy occurring 15 years earlier to the issue of whether petitioner fondled another daughter as charged and ultimately concluded that "if ever there was an instance in which Mil. R. Evid. 403 ought to have precluded admission of the sodomy evidence, it is here." *Id.* at 368.

The three separate opinions of the judges of the Court of Military Appeals strongly reflect the state of conflict among our nation's courts with regard to the admissibility of uncharged misconduct in child sexual abuse cases. Simply put, had petitioner had the good fortune to be tried today by a federal district court in the Eighth Circuit, a trial judge, in reliance on the Eighth Circuit Court of Appeals' opinion in *United States v. Fawbush*, interpreting the same federal rule as the Court of Military Appeals, would have refused to admit the older daughter's testimony and petitioner would likely have been acquitted. No legitimate reasons exists for this lack of equal protection of the laws and, under our system of justice it presents an untenable due process deprivation.

CONCLUSION

The Court of Military Appeals erred in admitting testimony of uncharged acts of sodomy on an older daughter which bore no relevance to the charged acts of fondling a younger daughter but possessed tremendous prejudicial impact and, by so doing, sanctioned a clear violation of petitioner's right to due process of law and rendered petitioner's trial fundamentally unfair. This case provides this Court with the opportunity to answer the question of whether child sexual abuse cases occupy a special category in our courts to which the usual rules of evidence do not apply. Accordingly, petitioner submits this case warrants examination by this Court. Therefore, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

U.S. COURT OF MILITARY APPEALS

No. 64,268

CM 8901236

UNITED STATES,

Appellee

v.

ARDOLFO MUNOZ, Staff Sergeant,
U.S. Army,

Appellant

Argued Dec. 17, 1990

Decided June 14, 1991

Opinion of the Court

SULLIVAN, Chief Judge:

During March of 1989 appellant was tried by a general court-martial composed of officer members at Fort Monmouth, New Jersey. Contrary to this pleas, he was found guilty of four specifications of committing indecent acts on his minor daughter, [A], in violation of Article 134, Uniform Code of Military Justice, 10 USC § 934. He was sentenced to a bad-conduct discharge, confinement for 3 years, and forfeiture of $300 pay per month for 36 months. The sentence was approved by the convening authority on May 3, 1989. The Court of Military Review affirmed on January 3, 1990, in a short-form opinion.

This Court granted review 31 MJ 414 on the following two issues of law raised by appellate defense counsel:

I

WHETHER THE MILITARY JUDGE ERRED TO APPELLANT'S SUBSTANTIAL PREJUDICE BY PERMITTING APPELLANT'S DAUGHTER [I] . . . TO TESTIFY, OVER DEFENSE OBJECTION, REGARDING PRIOR ACTS OF UNCHARGED MISCONDUCT BY APPELLANT.

II

WHETHER EVIDENCE OF APPELLANT'S UNCHARGED MISCONDUCT OF SEXUAL ABUSE OF HIS DAUGHTER . . . SHOULD HAVE BEEN EXCLUDED UNDER MILITARY RULE OF EVIDENCE 403.

We find no prejudicial abuse of discretion by the military judge in this case and affirm. *United States v. Castillo*, 29 MJ 145, 151 (CMA 1989). *See generally United States v. St. Pierre*, 812 F.2d 417, 420 (8th Cir. 1987).

Appellant was found guilty of four specifications of indecent acts with his minor daughter, [A]. Two specifications alleged that he fondled her and placed his hands on her breasts and vagina. Two other specifications alleged that he fondled her and placed his hands on her breasts. The first two offenses allegedly occurred in his government quarters at Pirmasens, West Germany, during January 1987. The latter offenses purportedly occurred in Arizona and New Jersey in February 1987 and June 1988. [A] was around 10 or 11 years old at the time of these offenses, but she was 12 when she testified against her father. He also took the witness stand at this court-martial, but he denied that any sexual misconduct occurred.

Prior to this court-martial, the defense made a motion *in limine* to "preclude the admission of any evidence concerning alleged acts of sexual misconduct between the accused and his other daughters." The Government opposed this motion and asserted that such evidence was admissible in its case on the merits "to prove a common scheme or plan. . . ." It specifically referred to the decision of this Court in *United States v. Mann*, 26 MJ 1 (CMA), *cert. denied*, 488 U.S. 824, 109 S.Ct. 72, 102 L.Ed.2d 49 (1988).

The military judge questioned the Government concerning its proffer of evidence. The record states:

> MJ: All right, for purposes of this motion that's what we're interested in. All right, now as far as [I] is concerned, she's going to say that at the age of 9-11, somewhere in that area, again, she was at home, there were other people at home and that the accused fondled her breasts. Is that right? What else is she going to testify to?
>
> TC: And rubbed her vagina. *The government would certainly limit her testimony too, because there were acts of sodomy in this case. But the government would not elicit testimony as to those incidents due to the prejudicial potential and would limit it it to the discussion of the offense.*
>
> MJ: To similar offenses. Is that what you're trying to say?
>
> TC: Yes, sir.
>
> MJ: Okay.
>
> DC: Your Honor, clearly that cannot be done because—
>
> MJ: Oh, it can be done all right. It might not be a good thing to do.

Trial counsel later repeated to the military judge his theory of admissibility, as follows:

MJ: All right, would you state again what your view is, Captain Carey, with respect to, you're offering this for a common scheme or plan?

TC: Yes, Your Honor.

MJ: Okay, what's the theory?

TC: The theory is that Sergeant Munoz would drink alcohol, become intoxicated and then approach his daughters while they were alone in a room in the house, either the bedroom or the living room, and that family members either present in the house but another part of the house or out of the house entirely *and that the fondling would occur, rubbing of breasts and vagina, and* then always a statement afterwards that, "This is our secret. Don't tell anybody about that." That these would occur periodically. There was, of course, only the one instance with [AA] but there are multiple instances with [A] as charged and also with [I].

And again, the government cites the *Mann* case and the fact that the court excluded the evidence in that case I'm sure is not the deciding factor. Certainly it lays out the test. And in this case, unlike the *Mann* case, all the witnesses to the uncharged misconduct remember clearly what happened unlike in the *Mann* case.

(Emphasis added.)

The military judge initially deferred ruling on the motion. He subsequently ruled prior to pleas as follows:

MJ: All right, with respect to your motion on the testimony of the two witnesses, [AA] and [I], I find that the testimony of these two witnesses to be probative of a plan on the accused's part to sexually abuse his children and I find a nexus of time. The fact that events were removed in time from the other does not undermine their relevance. Whether you have the same victim is an important component of the alleged plan. *The similarity of the acts; that*

is, the fondling of breasts and vagina; the common situs of the commission in the home of the family; the age of the victims at the time; the fact that other people were present; the fact that the accused had been drinking are all matters of commonality that I've carefully considered.

I further find that based on the averments of counsel, that the uncharged misconduct is plain, clear and conclusive and I find that on balance, the probative value of the uncharged misconduct outweighs the prejudicial impact, whatever prejudicial impact it may have and that the evidence may be presented to show a plan on the part of the accused to sexually abuse his children.

Therefore, the motion is denied. We'll hear the plea at this time.

(Emphasis added.)

The victim, [A] subsequently testified at this court-martial and implicated appellant in the charged offenses. Defense counsel then renewed his objection to the expected testimony of [I] and [AA]. He asserted that the incidents they would relate were distinctly different from [A]'s testimony such that they were not evidence of a common plan or scheme. The military judge then heard the testimony of both of the victim's sisters out of the presence of the members. He then ruled as follows:

MJ: Okay, I'm going to reconsider my [ruling] and upon reconsideration I'm going to exclude [AA]'s testimony. The first sister. But for the reasons that I set out in my, because I think there's a 403 problem with that and I think upon hearing her testify and based on the fact [that it's] only one incident, I think that is susceptible to more prejudice than substance so I'm not going to allow that because I think there's a 403 problem. But I don't see any problem with the testimony of the other sister, [I] and I'm going to allow that in for the reasons that I gave in the findings before.

The daughter, [I], then testified as follows before the members:

DIRECT EXAMINATION

(Questions by the prosecution):

Q. Would you state your full name for the record?

A. [I].

* * * * *

Q. And how old are you?

A. 24.

Q. Do you know the accused?

A. Yes.

Q. And how do you know him?

A. He's my father.

Q. Let me draw your attention back to when you were 8 or 9-11 years of age. You remember where you lived during that time?

A. West Fort Hood, Texas.

Q. Did you have any occasion during that period where your father may have touched you?

A. Several. Yes.

Q. Could you describe for us, please, how this first happened?

A. There was several times. Once my family was in, my sister and my mom were sitting in the living room and I was making popcorn in the kitchen. My father came in. He pulled my pants down, started fondling my vagina.

Q. How old were you at this time?

A. I guess 9 or 10.

Q. I'm sorry?

A. 9 or 10.

Q. And was anybody else in the kitchen besides you?

A. No.

Q. What time of day was this?

A. I'm not real sure. Late afternoon. Evening.

Q. Had your father been drinking?

A. Not—

Q. Do you recall?

A. Not at that time. No.

Q. What happened?

A. He was fondling my vagina. He did that for a little while and the next thing I knew he has his face to where he's, I don't know, touching my vagina with his tongue.

Q. How long did this last, this incident?

A. Oh, anywhere from about 10 minutes or so.

Q. Were there other instances during the age when you were 9-11 where these sorts of things happened?

A. Yes. Another time my sisters were outside in the backyard playing, I believe, mow[ing] the lawn. My father took me into the storage shed and again started fondling my vagina and sodomized me.

Q. What do you mean by "sodomized"? I know it's difficult.

A. He had anal sex.

Q. Do you recall when you reached puberty?

A. About 10. It was early.

Q. Were there ever any instances where these sorts of things happened in your parents' bedroom?

A. Yeah, there's one time where he took me in there, showed me the Playboy Hustler magazines of nude women in there and then he fondled my vagina a little bit and there was a knock at the door and it was my older sister, [D], and he stepped out of the room. She—I don't know what he did, but she came back later and took me out of the room and later on that evening he brought me back in there while they were outside or watching TV and again started fondling my vagina and this time I was laying next to him completely nude and this lasted for a little while and then he proceeded to sodomize me again.

Q. Did he ever say anything to you about these acts during their occurrence or afterwards?

A. He always told me he loved me and that's why we were doing it and never to say anything because

mom would really be mad with me and it would hurt her very much and would make her really angry.

Q. Did you ever tell anybody about this?

A. No, not while we were at Fort Hood.

Q. You said this happened several times to you there?

A. (Indicated an affirmative response.)

Q. Had your father been drinking during these periods?

A. Yeah, there's been quite a few occasions where he was. He would take me into the bathroom and fondle my vagina for a while and have oral sex with me and then turn me over and sodomize me.

Q. Were there instances, . . ., where he fondled you outside your clothing prior to progressing into the actual acts that you described?

A. When I was younger.

Q. And what did he do?

A. It would start out as a tickling game. He'd start on my stomach and then eventually worked down to my underwear, but it would be over my underwear.

Q. When did you first tell anybody that this had happened?

A. When we lived in Fort Riley, Kansas where he had made an attempt on my younger sister, [AA], and I believe it was that night that I told my older sister, [D], that he had also done this to me and not just one time.

Our starting point in resolving the first granted issue is Mil.R.Evid. 404(b). Manual for Courts-Martial, United States, 1984. It states:

> (b) *Other crimes, wrongs, or acts. Evidence of other crimes, wrongs or acts* is not admissible to prove the character of a person in order to show that the per-

son acted in conformity therewith. It *may, however, be admissible for other purposes, such as proof of motive*, opportunity, intent, preparation, *plan*, knowledge, identity, or absence of mistake or accident.

(Emphasis added.) The prosecutor's theory of admissibility for appellant's uncharged misconduct with [I] and [AA] was that it showed a plan on his part to sexually abuse his daughters at a young age. Consequently, he averred that the subsequent sexual misconduct with [A], in testimonial dispute at this court-martial, also probably occurred as individual manifestations of the same plan. *See United States v. Mann*, 26 MJ at 4; *United States v. Brannan*, 18 MJ 181, 183 (CMA 1984).

Appellant contends that the uncharged sexual misconduct evidence in this case did not show a "plan" but instead reflected "a generic description of familial sexual abuse." He asserts that it was nothing more than a collection of disparate acts which were remote in time and dissimilar in nature and circumstance. Furthermore, he expands upon his objection at trial and now contends that [I]'s actual testimony also exceeded the scope of the Government's initial proffer of evidence. This additional sexual-misconduct evidence, he asserts, reinforces the dissimilarity of the acts of uncharged misconduct to the charged offenses and rendered her testimony on these matters inadmissible.

The core of appellant's Mil.R.Evid. 404(b) argument is that the uncharged misconduct against [I] did not rationally reflect a plan on appellant's part to sexually abuse his daughters. *See generally United States v. Brannan, supra* at 183-84 (CFA 1984). The military judge rejected this contention specifically, noting significant elements of concurrence between the uncharged acts and the charged acts which suggested a common plan. *See generally* 2 Wigmore, *Evidence* §§ 304, 357(3), and 360 (Chadbourn rev. 1979). The common factors were the age of the victim, the situs of the offenses, the circumstances surrounding

their commission, and the fondling nature of the misconduct. On this basis we hold that the military judge did not abuse his discretion in concluding that all the uncharged misconduct was "probative of a plan on appellant's part to sexually abuse his children." *United States v. Mann, supra* 26 MJ at 5. *Cf. United States v. Fawbush*, 900 F.2d 150, 151 (8th Cir.1990). *See generally Mil.R.Evid.* 401 and 402.

We must also reject appellant's particular claim of remoteness based on the occurrence of those acts at least 12 years earlier. *See generally United States v. Cuch*, 842 F.2d 1173, 1178 (10th Cir.1988). In this case the object of appellant's purported plan was the sexual abuse of his young daughters. Accordingly, the victim's age at the time of the offenses was the critical concern, not the period of time between the misconduct and the charged offenses. *United States v. Mann, supra; United States v. Hadley*, 918 F.2d 848, 851 (9th Cir.1990).

Moreover, this is not a case like *United States v. Ferguson*, 28 MJ 104 (CMA 1989), where the uncharged misconduct was offered for a purpose under Mil.R.Evid. 404(b) which was not a material issue in that case. *See United States v. Estabrook*, 774 F.2d 284, 287 (8th Cir. 1985). *United States v. Gustafson*, 728 F.2d 1078, 1083 (8th Cir.), *cert. denied*, 469 U.S. 979, 105 S.Ct. 380, 83 L.Ed.2d 315 (1984). The critical issue here was the occurrence of the charged indecent acts, and evidence of appellant's plan to do such acts was probative on this point. *United States v. Mann, supra. See generally United States v. Beahm*, 664 F.2d 414, 417 (4th Cir. 1981). Accordingly, we find no legal error in the military judge's ruling under Mil.R.Evid. 404(b). *See United States v. Orsburn*, 31 MJ 182, 187 (CMA 1990). *See generally Story v. Collins*, 920 F.2d 1247, 1254 (5th Cir. 1991).

The more difficult problem in this case arises under the second granted issue. It stems particularly from the

portion of [I]'s testimony concerning the more serious acts of sexual misconduct perpetrated upon her by appellant. She testified that her father orally and anally sodomized her on several occasions and attempted to sexually assault her sister, [AA], when they lived at Fort Riley. We note that trial counsel had earlier conceded that [I]'s testimony on the sodomies would not be adduced by the Government because of its potential for prejudice. Moreover, the judge ruled that testimony by [AA] concerning appellant's one-time attempt to sexually assault her would also not be admissible at this court-martial.

Admissibility of this testimony under Mil.R.Evid. 403 was highly questionable. Appellant was only charged with fondling his minor daughter. The uncharged acts of sodomy were clearly more egregious and more reprehensible than those acts or the uncharged acts of fondling. *See United States v. Fortenberry*, 860 F.2d 628, 632 (5th Cir.1988), *cert. denied*, —— U.S. ——, 111 S.Ct. 1333, 113 L.Ed.2d 265 (1991); *cf. United States v. Brooks*, 670 F. 2d 625, 628 (5th Cir.1982). A strong possibility of prejudice existed on this basis alone. *See generally* E. Imwinkelried, *Uncharged Misconduct Evidence* § 8:24 (1984). Nevertheless, for several reasons we find reversal of appellant's conviction is not required by admission of this potentially inflammatory uncharged-misconduct evidence. *United States v. Mann*, 26 MJ at 5. *Cf. United States v. Kinman*, 25 MJ 99 (CMA 1987).

Although not decisive, we must note that appellant did not object at the actual trial to [I]'s testimony about the sodomies on the basis that it exceeded the scope of trial counsel's earlier concession. In addition, he did not object to her testimony on the assault of [AA] on the basis that it violated the trial judge's earlier ruling barring [AA]'s testimony concerning this same incident. Finally, although he cited Mil.R.Evid. 403 in his earlier written motion objecting to [I]'s testimony, he did not clearly pursue this undue-prejudice objection at the time she

actually presented her testimony to the judge or the members. His final oral objection to the sodomy evidence was predicated only on its dissimilarity to the charged actions of fondling such that it did not qualify for admission as evidence of a plan under Mil.R.Evid. 404(b). *See United States v. Brannan*, 18 MJ at 184. Such defense inaction is at best puzzling and suggests waiver of his Mil.R.Evid. 403 claim. *See* Mil.R.Evid. 103(a)(1).

In any event, this failure to properly object to the additional testimony of [I] reflects recognition of the fact that continuation of this objection, once the uncharged fondling evidence was admitted, was clearly superfluous. The victim's (A's) testimony was already substantially corroborated by the showing of appellant's sex-abuse plan through the evidence of his repeated fondling of [I]. Admission of evidence of additional sexual misconduct of a more serious degree with [I] for this same purpose was simple overkill. *Cf. United States v. Ferguson*, 28 MJ at 109-10. Secondly, we note that a limiting instruction carefully delineating the proper use of all this uncharged misconduct evidence was given in this case.* *See United States v. St. Pierre, supra.* Accordingly, we are convinced that admission of this portion of [I]'s testimony did not substantially change the outcome of appellant's trial. Art. 59(a), UCMJ, 10 USC § 859(a); *United States v. Barnes*, 8 MJ 115 (CMA 1979).

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* Now with respect to the testimony of [I], evidence that the accused may have committed certain acts with her, which would be uncharged misconduct; that is, other criminal offenses which are not before you; that evidence may be considered by you for the independent purpose of its tendency, if any, to prove a plan or design of the accused to sexually molest his own children. Now, you may not consider that evidence, that is the evidence presented by [I], for any other purpose. And you may not conclude from that evidence that the accused is a bad person or has criminal tendencies and he, therefore, committed the offenses as charged. That evidence was not offered for that purpose and you may not use it for that purpose. You may, as I say, use it only for the limited purpose of its tendency, if any, to prove a plan or a design by the accused to sexually molest his own children.

The decision of the United States Army Court of Military Review is affirmed.

COX, Judge (concurring):

Senior Judge Everett leads off his attack on the majority opinion as follows:

> First, there simply is no theory at all within the scope of Mil.R.Evid. 404(b), Manual for Courts-Martial, United States, 1984, under which *any* of the evidence of prior sexual abuse of appellant's other daughters is relevant. *See* Mil.R.Evid. 401 and 402.

At 366.

In my judgment, he is wrong. Evidence of similar sexual conduct, particularly deviant sexual conduct such as incest, is powerful circumstantial evidence which corroborates the testimony of the victim in many cases. *See* E. Imwinkelried, *Uncharged Misconduct Evidence* §§ 4:11-4:18 (1984).[1]

I recognize the dangerous and unfair prejudice that can flow from introduction of evidence of similar sexual behavior into the trial of a case. Thus, the military judge must decide whether the "probative value" of the evidence "is substantially outweighed by the danger of unfair prejudice." Mil.R.Evid. 403; *United States v. Reynolds*, 29 MJ 105, 109 (CMA 1989); S. Salzburg, L. Schleuter, *Military Rules of Evidence Manual* 362 (2d ed. & 1990 Supp.).

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[1] Professor Imwinkelried points out that many jurisdictions have permitted evidence of similar sexual behavior under the guise of "plan." He characterizes this as a "spurious plan." E. Imwinkelried, *Uncharged Misconduct Evidence* §§ 4:13 and 3:23 (1984). He seems to prefer the "intellectual honesty" of those jurisdictions which have carved out an exception to rules akin to Mil.R.Evid. 404(b), Manual for Courts-Martial, United States, 1984, in sexual prosecutions. *Id.* at § 4:14. I have some personal reservations about whether evidence about one's sexuality is really "character evidence." Or is it something else?

Here, the military judge was sensitive to his duties. Indeed, notwithstanding Senior Judge Everett's uncharacteristic attack on him, the military judge *excluded* other highly probative testimony of sexual acts performed by the accused on a third daughter. Perhaps I am reading a different record from my learned colleague, but I would never accuse this military judge of sitting "deaf and dumb." At 366. What I hear and see in this record is a father who brutally and maliciously abused his daughters. Whether he abused them with his tongue or penis or by touching and fondling their private parts is of little consequence; it was his use of the children as objects to gratify his sexual desires which is in issue.[2]

Unfortunately, crimes of this nature are committed in secrecy and privacy. The children suffer not only from the abuse, but also from the effects of the prosecution. *See United States v. Arruza*, 26 MJ 234, 238-39 (CMA 1988), *cert. denied*, 489 U.S. 1011, 109 S.Ct. 1120, 103 L.Ed.2d 183 (1989). Where the evidence of *similar* sexual deviant behavior is proved by the Government, it is admissible against an accused.

EVERETT, Senior Judge (dissenting):

The incredibly explosive testimony of Isabelle Munoz has been handled by all parties at all stages of the litigation of this case with all the sensitivity of a prizefighter's glove-clad fists. First, trial counsel blithely ignored his own, self-expressed limitations that he had placed on the

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[2] Senior Judge Everett also finds "no relevance at all" in "whether appellant sodomized one daughter 15 years earlier." At 368. I note that the drafters and sponsors (fourteen senators) of S.472, 102d Cong., 1st Sess. § 231 (1991), seem to find such relevance in their proposed new Fed.R.Evid. 414:

> In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

testimony he would seek from Isabelle; he not only permitted the inflammatory testimony to be uttered by his witness, but he also pursued its expansion and repetition. Second, the military judge—in classic hear-no-evil and say-no-evil fashion—sat deaf and dumb to the scene in front of him. Third, defense counsel—who, notwithstanding the majority opinion, quite clearly earlier had acted adequately to avoid the legal guillotine of waiver from falling on his client—sat bolted to his chair while Isabelle severed the jugular vein of his defense. Fourth, the Court of Military Review dismissed appellant's appeal with the indifference and nonchalance of a 6-line, short-form affirmance, without a hint of any of the nuances of this issue.

Finally, comes the opinion of the majority of this Court. Unfortunately, when faced with rules of evidence that require the delicate touch of a surgeon's scalpel, the majority instead has wielded a bludgeon in three critical respects.

I

First, there simply is no theory at all within the scope of Mil.R.Evid. 404(b), Manual for Courts-Martial, United States, 1984, under which *any* of the evidence of prior sexual abuse of appellant's other daughters is relevant. *See* Mil.R.Evid. 401 and 402. Where an accused does not dispute that an act occurred but does dispute that he was the culprit, modus-operandi evidence of prior acts by the accused that bear the same "signature" as the act in contest might be relevant to prove the accused's identity as the perpetrator. S. Saltzburg, L. Schinasi, and D. Schleuter, *Military Rules of Evidence Manual* 362 (2d ed.1986) (hereafter Saltzburg). *E.g., United States v. Gamble*, 27 MJ 298 (CMA 1988); *United States v. Rappaport*, 22 MJ 445 (CMA 1986. Also, where an accused does not dispute that an act occurred but does dispute that he did so with a requisite intent or affirmatively insists that he did so by accident or as a result of mistake

of fact, evidence of prior similar acts by an accused might be relevant to show the necessary intent or to rebut suggestions of accident or mistake of fact. Saltzburg, *supra; United States v. Mann*, 26 MJ 1 (CMA), *cert. denied*, 488 U.S. 824, 109 S.Ct. 72, 102 L.Ed.2d 49 (1988).

Here, however, appellant absolutely disputed the occurrence of the acts themselves. In substance, he defended against the charges by asserting, quite simply, that none of the acts ever occurred. Under these circumstances, the only possible purpose of the evidence of prior acts that was used here would be to suggest: "He did it before, so you can believe the prosecutrix when she says that he did it again."

Yet, that is *precisely* the purpose to which such evidence may *not be put*. Mil.R.Evid. 404(b) begins unambiguously: "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith." *Accord* Mil.R.Evid. 404(a). "The principle at work is that specific acts may not be used to prove the kind of person someone is in order to show how he probably acted on a particular occasion." Saltzburg, *supra* at 361.

As the majority points out, the stated prosecutorial purpose of the evidence was "to prove a common scheme or plan"—specifically, "to sexually abuse his daughters at a young age." At 360 and 363. *See United States v. Hicks*, 24 MJ 3 (CMA), *cert. denied*, 484 U.S. 827, 108 S.Ct. 95, 98 L.Ed.2d 55 (1987). Embracing this theory, the majority finds that "[t]he common factors were the age of the victim, the situs of the offenses, the circumstances surrounding their commission, and the fondling nature of the misconduct." At 363.

In *Mann* I expressed my views that prior sexual acts with a sibling of the prosecutrix that had occurred 5 years earlier "were too remote in time and place to sustain the

Government's theory of admissibility—namely, that they evidence a common scheme or plan." 26 MJ at 6 (Everett, C.J., concurring in part and dissenting in part). Of course, here where the alleged prior acts had occurred *15* years before those charged—and, indeed, prior even to the *birth* of the prosecutrix—I perceive no relevance at all in such prior-acts evidence to prove a common scheme or plan. *See also United States v. Gamble, supra.*

Even apart from remoteness, I am considerably uncomfortable with the majority's conclusion that enough common factors existed between the charged offenses and the prior acts that a comparison demonstrates a common scheme or plan. Actually, I believe that this case more closely resembles the situation we addressed in *United States v. Rappaport, supra,* where the accused—a psychologist—was charged with various acts relating to having sexual affairs with two patients; he admitted one—"maintaining that he fell in love with her"—but denied the other altogether. 22 MJ at 446. In rebuttal, the Government introduced testimony of a third woman who contended that, under circumstances in several ways similar to the charged incidents, the accused had had sexual intercourse with her, too. We wrote:

> The Government argues that this evidence was properly admitted for the purpose it was instructed upon at trial, that is, to prove that the accused engaged in an affair with Mrs. "S" as a part of a larger plan to take advantage of his female patients. We disagree. Evidence that the accused previously had a similar affair with one of his patients did not tend to establish a plan or overall scheme of which the charged offenses were part. *It tended to establish propensity, not plan.*

Id. at 447 (citations omitted; emphasis added).

II

Second, if *any* of the prior-acts testimony was admissible, it was limited to testimony as to acts that were similar to the ones charged. Trial counsel recognized that this did not include evidence as to prior sodomy—acts not at all similar to those charged and acts that are so much more serious than those charged as to trample upon any notion that such evidence would be more probative than it would be unfairly prejudicial, *see* Mil.R.Evid. 403. Accepting the prosecutor's assurance that he would so limit the witness's testimony, the military judge ruled that he would permit the evidence. Of course, as the majority opinion makes clear, both the prosecutor and the military judge ignored this limitation when the witness expanded her testimony to address, repeatedly, instances of sodomy on her by appellant.

Only if one expands the "common scheme or plan" concept to one that embraces *all* sexual misconduct by an accused on his children can this evidence of sodomy be deemed within Mil.R.Evid. 404(b). However, *none* of our prior cases represents such an expansive view of common scheme or plan. *Cf. United States v. Rappaport, supra.* Even in *Mann*, the majority took pains to couple closely the nature of the challenged evidence to the nature of the crimes charged. The majority's expansion of this doctrine in this case to include the sodomy evidence contravenes the expressed limitations in Mil.R.Evid. 404(a) and (b). Quite simply, whether appellant sodomized one daughter 15 years earlier has no relevance at all to whether he fondled another daughter as charged.

Even under the majority's notion of the relevance of this evidence, if *ever* there was an instance in which Mil. R.Evid. 403 appropriately ought to have precluded admission of the sodomy evidence, it is here. This is the sort of situation that the authors of the *Military Rules of Evidence Manual* must have had in mind when they warned:

> Any time the prosecution attempts to offer other acts of the accused as part of its substantive proof

> there is a very real problem of prejudice . . . . No matter how carefully the court-members are instructed that the evidence is not to be used for a determination of whether the accused is a good or bad person, there is a possibility of misuse. The worse the act, the greater the chance that court-members may lose sympathy for the accused and decide against him because he is a bad person—something that the law does not allow.

Id. at 361.

Accordingly, the authors admonished:

> The factors mentioned above highlight why Rule 403's balance is so important in connection with Rule 404(b) holdings. In deciding whether to admit or to exclude evidence, trial judges should be aware of the constant danger of prejudice and should pay close attention to the kind of act that is to be proved.

Id. at 362 (footnote omitted).

III

Finally, I cannot imagine how the majority arrived at its conclusion that appellant's trial defense counsel waived his objections to the challenged evidence because, during the witness' testimony, he did not *renew* his earlier objection. Apparently my Brothers forgot what they had written much earlier in their opinion: "Prior to this court-martial, the defense made a motion in limine to 'preclude the admission of any evidence concerning alleged acts of sexual misconduct between the accused and his other daughters.'" At 360.

Keep in mind that, in response to this objection to *any* evidence of sexual misconduct with other daughters, the military judge entered a *partial* ruling that evidence of *fondling* would be admissible; he did not enter a ruling on the objection to the remainder of the evidence because trial counsel himself represented that he would not offer it. While defense counsel's silence during the testimony

when the sodomy evidence came out may not have been the model of advocacy, it most certainly did not amount to waiver: His objection to *any* evidence of this nature was clearly on record—all that Mil.R.Evid. 103 requires. *See United States v. Ciulla*, 32 MJ 186, 188 (CMA 1991) (Everett, S.J., concurring in part and dissenting in part).

In *United States v. Gamble*, 27 MJ at 305-07, we discussed at some length the legitimacy of motions *in limine* regarding admissibility of evidence similar to that in issue here. We discussed, as well, what need there was for counsel—who had received an adverse ruling in response to his motion in *limine*—to pop up during the subject testimony and lodge an objection, else risk being found to have waived the matter for appellate review. After acknowledging that the military judge could decline to rule finally on such a motion because of possible uncertainty as to how the trial might unfold, we wrote:

> If he [the military judge] does rule, however, and if his ruling leaves no doubt that he intends for it to be final, then it is final for purposes of appellate review. Insisting on a subsequent defense objection at the time the evidence is offered in order to preserve the issue for appeal would be a classis insistence on form over substance.

Id. at 307 (footnote omitted).

In some courts decades ago, it was necessary that, in order to preserve an overruled objection, an attorney had to move to strike the answer to the question to which the objection had been filed. Obviously, this requirement wasted time and tended to disrupt the witness' testimony. I hope that the majority does not intend to commit military justice to the same meaningless formalism. I would have thought that we resolved this matter in *Gamble*.

IV

Appellant was the victim of major evidentiary error. Accordingly, he should receive a full rehearing.

APPENDIX B

UNITED STATES ARMY COURT OF MILITARY REVIEW

Before
DEFORD, KANE, and WERNER
Appellate Military Judges

ACMR 8901236

UNITED STATES,
Appellee

v.

Staff Sergeant ARDOLFO MUNOZ,
527-54-9435,
United States Army,
Appellant

United States Army Communications-Electronics Command and Fort Monmouth

E.A. Pauley, Military Judge

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3 January 1990

DECISION

Per Curiam:

On consideration of the entire record, including consideration of the issues personally specified by the appel-

lant, we hold the findings of guilty and the sentence as approved by the convening authority correct in law and fact. Accordingly, those findings of guilty and the sentence are AFFIRMED.

FOR the COURT:

/s/ Mary B. Dennis for
WILLIAM S. FULTON, JR.
Clerk of Court

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(2)

No. 91-410

In the Supreme Court of the United States

OCTOBER TERM, 1991

ARDOLFO MUNOZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the trial judge abused his discretion by admitting evidence of petitioner's prior uncharged sexual offenses under Mil. R. Evid. 404(b).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and rules:

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-20a, is reported at 32 M.J. 359. The opinion of the court of military review, Pet. App. 21a-22a, is unreported.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 14, 1991. The petition for a writ of certiorari was filed on September 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Monmouth, New Jersey. He was convicted of four speci-

fications of committing indecent acts with a minor child, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to a bad conduct discharge, confinement for three years, and forfeiture of $300 pay per month for 36 months. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed the findings and sentence. Pet. App. 21a-22a. Upon discretionary review, the Court of Military Appeals affirmed. Pet. App. 1a-20a.

1. The evidence at trial showed that on four separate occasions between January 1987 and June 1988, petitioner committed indecent acts with Annette, his minor daughter, by fondling her and touching her breasts or her vagina. Annette was the government's primary witness against petitioner. Petitioner testified in his own behalf and denied that he committed the charged offenses. Pet. App. 2a.

Prior to trial, petitioner moved to bar any evidence that he had sexually molested his two daughters, Isabel and Alberta. The prosecutor opposed the motion. He argued that the uncharged offenses were similar to the charged offenses in that it was petitioner's method to become intoxicated, approach one of his daughters while she was alone in a bedroom or the living room, and fondle her by rubbing her breasts or her vagina. Afterwards, petitioner would tell his daughter, "[t]his is our secret. Don't tell anybody about that." The prosecutor also stated that petitioner had actually sodomized Isabel and Alberta on various occasions, but because of the prejudicial impact of those crimes, he would not seek to admit evidence of them at trial. Pet. App. 3a-4a.

Based on the proffer, the trial judge ruled that he would admit the evidence of petitioner's sexual moles-

tation of his other daughters. He emphasized that the uncharged offenses were very similar to the charged offenses. In each case, petitioner fondled the breasts or vagina of his daughters at his home after he had been drinking, other persons were present, and the offenses occurred when his children were very young. Pet. App. 4a-5a.

During the trial, Annette testified that petitioner had repeatedly sexually molested her. After her testimony, petitioner renewed his objection to the admission of the evidence that he had molested his other daughters. With the panel members absent, Alberta and Isabel testified that petitioner had sexually molested them while they were children. The trial judge then ruled that evidence of petitioner's sexual molestation of Isabel would be admitted, but that Alberta's testimony would be excluded, since she had mentioned a single act of sexual molestation. Pet. App. 5a.

Isabel, who was 24 years old at the time of trial, testified that when she was between 9 and 11 years old petitioner had occasionally approached her at their home and fondled her vagina. On other occasions, she said, petitioner had had oral and anal sex with her. Most of the time, she testified, petitioner had been drinking before he initiated sexual activity. Petitioner did not object to Isabel's testimony concerning the sodomy, despite the prosecutor's earlier assertion that he would not present evidence of petitioner's uncharged sodomy offenses. Pet. App. 6a-8a. Afterwards, the trial judge instructed the court-martial panel members that they could consider petitioner's sexual activity with Isabel only "to prove a plan or design of [petitioner] to sexually molest his own children," and not to show that he was "a bad person or has criminal tendencies and he, therefore, committed the offenses as charged." *Id.* at 12a.

2. The Army Court of Military Review affirmed petitioner's conviction in a brief per curiam opinion. Pet. App. 21a-22a.

3. The Court of Military Appeals affirmed by a divided vote. Pet. App. 1a-20a. The court rejected petitioner's contention that the admission of his history of molesting Isabel violated Mil. R. Evid. 404(b). The court concluded that in light of the similarity between the charged offenses and petitioner's conduct toward Isabel, the trial judge did not abuse his discretion by admitting the challenged evidence. The court also concluded that the fact that the uncharged offenses had occurred about 12 years before the charged offenses did not change the analysis, because the critical concern was each child's age at the time of petitioner's conduct, not the period between the charged and uncharged offenses. The court of appeals also held that the admission of petitioner's uncharged acts of sodomy did not constitute reversible error, for several reasons. First, the court noted that petitioner did not specifically object to that evidence when it was admitted at trial through Isabel's testimony. Second, the court found the evidence to be "clearly superfluous" in light of the admission of the uncharged evidence of fondling. Third, the court pointed out that the trial judge had given a limiting instruction with respect to all of the "extrinsic act" evidence in the case. For those reasons, the court concluded that the admission of the evidence of acts of sodomy with Isabel was harmless error. Pet. App. 11a-12a.

Judge Cox concurred. In his view, the evidence of petitioner's uncharged sexual crimes was properly admitted because evidence of such conduct is powerful circumstantial evidence that corroborates the testimony of the victim. Pet. App. 13a-14a.

Judge Everett dissented. He reasoned that the 15-year-old uncharged sexual crimes were too remote to prove a common scheme or plan. In addition, he concluded that the similarities between petitioner's uncharged offenses and the charged offenses merely showed petitioner's propensity to commit sexual offenses against his daughters, not a plan to do so. Pet. App. 16a-17a. Finally, he would have found that petitioner had properly preserved his challenge to the admission of the uncharged sodomy crimes by objecting to all evidence of his uncharged offenses prior to trial. *Id.* at 19a-20a.

ARGUMENT

Petitioner contends that the trial judge erred by admitting the evidence of his sexual molestation and sodomy of his daughter Isabel.

1. Rule 404(b), Mil. R. Evid., like its federal counterpart, Fed. R. Evid. 404(b), provides that evidence of a defendant's other crimes is not admissible to prove that he is guilty because he has a bad character, but is admissible if it is relevant for other purposes, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In a prosecution for a sexual offense, evidence that the accused committed a factually similar sex offense against another victim may be admissible to show the defendant's intent, modus operandi, or plan, or for any legitimate reason other than simply to show that the defendant has a bad character. See, *e.g.*, *United States* v. *Hadley*, 918 F.2d 848, 851-852 (9th Cir. 1990); *United States* v. *Beahm*, 664 F.2d 414, 416-417 (4th Cir. 1981); *United States* v. *Gano*, 560 F.2d 990, 993 (10th Cir. 1977); *Pendleton* v. *Commonwealth*, 685 S.W.2d 549,

552 (Ky. 1985). The remoteness of the uncharged sex crime is a factor in determining its admissibility, but if the prior crime is very similar to the charged offense, evidence of the uncharged offense is admissible. See, *e.g.*, *United States* v. *Hadley*, 918 F.2d at 851 (10 years); *United States* v. *Cuch*, 842 F.2d 1173, 1178 (10th Cir. 1988) (more than 7 years); *United States* v. *Beahm*, 664 F.2d at 416 (within 3 years).

The trial judge in this case did not abuse his discretion by admitting the evidence of petitioner's sexual molestation of his daughter Isabel. The uncharged offenses were strikingly similar to the charged offenses: Petitioner's victims were his daughters; his daughters were about the same age when they were molested; the offenses occurred at petitioner's home; and petitioner usually fondled his daughters after he had been drinking. Because of those similarities, the uncharged offenses were probative because they demonstrated petitioner's modus operandi or pattern of behavior in sexually molesting his daughters. To be sure, the uncharged offenses were between 13 and 15 years old. But that fact was not enough to render the uncharged acts irrelevant, in light of their similarity to the charged acts. Furthermore, the trial judge specifically instructed the members that it could consider the uncharged misconduct evidence only as it related to petitioner's plan or design to molest his minor daughters, and not to show that he had a bad character or general propensities toward crime. See *Huddleston* v. *United States*, 485 U.S. 681, 691-692 (1988).*

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* The admission of the uncharged sodomy crimes also was not reversible error. As the court noted, petitioner did not

2. Contrary to petitioner's claim, the decision below does not conflict with the Eighth Circuit's decision in *United States* v. *Fawbush*, 900 F.2d 150 (1990). There, the accused was charged with molesting two children while he was their babysitter. At his trial, the district court admitted evidence that several years earlier, the accused had sexually molested his own daughters and had impregnated one of them. The Eighth Circuit reversed, holding that that evidence was improperly admitted under Fed. R. Evid. 404(b). The court reasoned that the evidence was inadmissible because "[t]he daughters' description of Fawbush's sexual abuse did not show a unique method also present in the charged offenses that tended to establish Fawbush as the perpetrator." 900 F.2d at 151. The court also stated that the other crimes were "unrelated to, and * * * occurred eight or more years before, the conduct charged." *Id.* at 152. Here, by contrast, the uncharged crimes were directly related to the charged offenses due to the striking similarities between them. *Fawbush* is therefore factually distinguishable from this case.

Petitioner also claims that the state courts are in disarray over the question whether uncharged sexual crimes may be admitted under a special category of uncharged crimes evidence. Pet. 12-13. Disagreement among the state courts over evidentiary matters, however, does not call for review by this Court. State courts are free to develop their own rules of evidence, including rules regarding the admissibility of prior uncharged crimes. *Lisenba* v. *California*, 314

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object at trial to Isabel's testimony on that point, which reflects that the main impact of her testimony was the corroboration that it provided for Annette's testimony by the similarity in the acts of molestation directed at the two daughters. Pet. App. 12a.

U.S. 219, 228 (1941) ("We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence."). See *Marshall* v. *Lonberger*, 459 U.S. 422, 438 n.6 (1983); *Burgett* v. *Texas*, 389 U.S. 109, 113-114 (1967); *Spencer* v. *Texas*, 385 U.S. 554, 564 (1967). Moreover, the court of appeals did not hold that there should be a special exception for sexual crimes to the general prohibition on the admission of bad character evidence, the point on which petitioner asserts the state courts are in conflict. Judge Cox commented favorably on that rationale, Pet. App. 13a-14a, but his opinion was not the opinion for the court. This case therefore provides no occasion to decide whether there should be a special exception to Rule 404(b) for sexual offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1991

☆ U. S. GOVERNMENT PRINTING OFFICE: 1991 312324 45129